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CASE NO. 82–394

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

MARY BELLASSARI, et al.,
Petitioner-Plaintiffs,

v.

JAMES McAVOY, et al.,
Respondents-Defendants.

CONNIE JEAN McQUARY, et al.,
Petitioners-Plaintiffs,

v.

JAMES McAVOY, et al.,
Respondents-Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. BROWN
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

EDWARD D. HAYMAN
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

Counsel of Record for Respondents McAvoy and Brown

GERALD PURSLEY
Law Director, City of Cuyahoga Falls

Counsel for Respondents Quirk and Valentine

ROBERT D. PRATT
Law Director, City of Akron

RANDALL A. COLE
Chief Assistant Director of Law
304 Municipal Building
Akron, Ohio 44308
(216) 375-2032

Counsel for Respondents Ray and Crandall

QUESTION PRESENTED

WHETHER A FEDERAL COURT CAN REVIEW THE WISDOM OF A DECISION OF A STATE LEGISLATURE ON A PUBLIC HEALTH ISSUE CONCERNING WHICH THERE IS CONFLICTING EVIDENCE AND WHICH INVOLVES THE WEIGHING ON CONFLICTING RISKS AND BENEFITS TO DIFFERENT SEGMENTS OF THE PUBLIC?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE..... 1
SUMMARY OF ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT 2
ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT 3
CONCLUSION 18
CERTIFICATE OF SERVICE..... 20

TABLE OF AUTHORITIES

Page

Cases:

Alkire v. Cashman,
305 F. Supp. 360 (S.D. Ohio, 1972), aff'd,
447 F.2d 598 (C.S. 6, 1973) *cert. denied*,
414 U.S. 858 (1973) 10, 11

Attaya v. Town of Gonzalez,
192 So.2d 188, 193 (La. App. 1966) 13

Baer v. City of Beard,
206 Or. 221, 292 P.2d 134 (1956) 12

Berman v. Parker,
348 U.S. 26 (1954) 9

Birnel v. Town of Fircrest,
53 Wash. 2d 830, 335 P.2d 819 (1959);
appeal dismissed, 361 U.S. 10 (1959) 12

Canton v. Whitman,
44 Ohio St. 2d 62, 337 N.E.2d 766 (1975),
appeal dismissed, 425 U.S. 956 (1976) 12

Chapman v. City of Shreveport,
225 La. 859, 74 So.2d 142 (1954),
appeal dismissed, 3618 U.S. 892 (1954) 12, 13

Collins v. State of Texas,
223 U.S. 228, 298 (1912) 11

Crawford v. City of Detroit,
389 F.2d 1001 (C.A. 6, 1968) 9

Cusak v. City of Chicago,
242 U.S. 526, 531 (1917) 9

Day-Bright Lighting v. State of Missouri,
342 U.S. 421, 423 (1952) 9

DeAryan v. Butler,
119 Cal. App. 2d 674, 260 P.2d 98 (1953),
cert. denied, 347 U.S. 1012 (1954) 12, 13, 14

Dowell v. City of Tulsa,
273 P.2d 859, 43 A.L.R.2d 445 (Okla. 1954);
cert. denied, 348 U.S. 912 (1955) 12, 13

Federal Employees for Non-smokers' Rights v. United States, 466 F. Supp. 181, 185
(D.C.C. 1978) 7

TABLE OF AUTHORITIES, *contd.*

Page

Cases:

Ferguson v. Skrupa,
372 U.S. 726, 729-730 (1863) 3, 8
Froncek v. City of Milwaukee,
269 Wisc. 276, 69 N.W. 2d 242 (1955).....12
Gasper v. Louisiana Stadium and Exposition District,
418 F. Supp. 716 (E.D. La. 1976), affirmed,
577 F.2d 897 (C.A. 5, 1978), rehearing denied,
581 F.2d 267, *cert. denied,* 439 U.S. 1079
(1979).....6, 7
Graybowl v. McNevin,
439 S.W. 2d 323, 330-331 (Kent, 1969).....13
Hall v. Bates,
247 S.C. 511, 148 S.E. 2d 345, 346 (1966) 14
Hodel v. Indiana,
452 U.S. 314, 333 (1981).....9
Jacobson v. Massachusetts,
197 U.S. 11 (1905).....9, 15
Jenkins v. McKeithen,
395 411, 421-422 (1969) 15, 17
Kraus v. City of Cleveland,
163 Ohio St. 559, 122 N.E. 2d 609 (1955),
appeal dismissed, 351 U.S. 935 (1956) 12
Lambert v. Yellowley,
272 U.S. 581, 590, 594, 596 (1926).....9
Laurel Hill Cemetery v. City and County of
San Francisco, 216 U.S. 358, 365-366
(1910).....9
Minnesota State Board of Health v. City of
Brainard, 241 N.W. 2d 624 (1976),
appeal dismissed, 429 U.S. 803 (1976) 11, 13
Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456, 464 (1981).....9, 10, 17
New Oreleans v. Duke,
427 U.S. 297 (1976).....9

TABLE OF AUTHORITIES, *contd.*

Page

Cases:

Paduano v. City of New York,
45 Misc. 2d 718, 257 N.Y.S. 2d 531, *affirmed,*
24 App. Div. 2d 437, 260 N.Y.S.2d 831 (1965),
affirmed, 17 N.Y. 2d 875, 271 N.Y.S.2d 305,
218 N.E. 2d 339 (1966), *cert. denied,* 385 U.S.
1026 (1967) 12

Price v. Illinois,
238 U.S. 446, 451-452 (1915) 9

Readey v. St. Louis County Water Co.,
352 S.W.2d 622 (1961), *appeal dismissed,*
371 U.S. 8 (1962) 12, 13

Schuringa v. City of Chicago,
30 Ill. 2d 504, 198 N.E. 2d 326 (1964);
cert. denied, 379 U.S. 964 (1965) 12, 14

Standard Oil Co. v. City of Marysville,
279 U.S. 582, 584 (1929) 9

Tanner v. Armco Steel Corp.,
304 F. Supp. 532 (S.D. Tex. 1972) 5

Teeter v. Municipal City of LaPorte,
236 Ind. 146, 139 N.E.2d 158 (1956) 12

United States v. Carolene Products,
304 U.S. 114, (1938) 8, 9, 10

Vance v. Bradley,
440 U.S. 93, 111-112 (1979) 9, 18

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., _____U.S._____, 102 S. Ct.
1186, 1196 (1982) 9

Wilson v. City of Council Bluffs,
253 Iowa 162, 110 N.W.2d 569 (1961) 12

TABLE OF AUTHORITIES, *contd.*

Page

Statutes and Regulations:

Ohio Revised Code Chapter 6109 3,4,10,11
Ohio Revised Code Section 6111.13 11
Ohio Revised Code Section 6109.20 1,2,10,11,17,18
42 U.S.C. Section 1983 6

STATEMENT OF THE CASE

On March 17, 1980, the Petitioners (hereinafter referred to as "the Complaining Citizens" or "Citizens") filed two separate actions in the United States District Court for the Northern District of Ohio. One action challenged the constitutionality of the fluoridation of the public water supply at Cuyahoga Falls, Ohio, as required by Section 6109.20 of the Ohio Revised Code and named as defendants the Attorney General of Ohio, the Director of the Ohio Environmental Protection Agency and various officials of the city. The other action challenged the fluoridation of the public water supply system of the City of Akron as required by Ohio Revised Code Section 6109.20 and named as defendants, the Ohio Attorney General, Ohio Director of Environmental Protection and various officials of the City of Akron. All defendants in both cases before the district court are referenced in this brief collectively as Respondents. The essence of both complaints below was that the Complaining Citizens alleged that they were users of the public water supplies at issue and the addition of fluoride to those water supplies would cause the Citizens various health problems, including cancer. The complaints were supported by an affidavit from a Doctor John Yiamouyignnis in which he claimed that fluoridation causes the various health problems alleged in the complaints.

The Ohio Attorney General and the Director of Environmental Protection filed answers alleging numerous defenses, including lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Shortly thereafter, they filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6). In essence, the Attorney General and Director of Ohio EPA alleged, *inter alia*, that after almost thirty years of litigation concerning the constitutionality of fluoridation there was no longer a substantial constitutional question

concerning the lawfulness of fluoridation. On June 1, 1981, the federal district judge, John M. Manos, granted the motion to dismiss in both cases.

The Complaining Citizens filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit from this ruling on June 19, 1981 and moved to consolidate the two cases. This motion was granted. Oral argument was held on May 18, 1982. On May 24, 1982, the court issued its decision affirming the district court. The court of appeals indicated that it took judicial notice that there existed scientific opinion holding that fluoridation was not harmful to health. On June 3, 1982, the Complaining Citizens moved for rehearing which was denied by the Sixth Circuit on July 7, 1982. On September 7, 1982, the Citizens filed their petition for a writ of certiorari with this Court.

SUMMARY OF ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT

The Complaining Citizens are attempting to litigate the wisdom of the Ohio General Assembly's decision, as expressed in Section 6109.20 of the Ohio Revised Code, to require fluoridation of public water supplies in Ohio. Numerous decisions of this Court, however, establish that the wisdom of such legislative judgments are not reviewable by the federal courts. The federal courts are limited to determining whether the legislature's basis for enacting the fluoridation statute is at least debatable. After almost thirty (30) years of litigation concerning the validity of fluoridation statutes, the differences of opinion in the scientific community concerning the risks and benefits of fluoridation clearly establish that there is at least a debatable basis for the Ohio legislature's decision to require fluoridation. Therefore, the Complaining Citizens' allegations of unconstitutionality should be rejected.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

THE OHIO GENERAL ASSEMBLY'S ENACTMENT OF CHAPTER 6109 OF THE OHIO REVISED CODE IS A LEGISLATIVE JUDGMENT CONCERNING THE RISKS AND BENEFITS OF PUBLIC WATER SUPPLY FLUORIDATION AND THE WISDOM OF THAT LEGISLATIVE DETERMINATION IS BEYOND THE REVIEW OF THE FEDERAL COURTS.

A. The Essence Of The Complaining Citizens' Claims Is An Attempt To Use The Judicial Process To Foist Upon All Other Members Of The Public The Complaining Citizens' Theories Of Good Health.

In their complaints which were dismissed below the Complaining Citizens allege that the fluoride added to the public water supplies of Cuyahoga Falls and Akron, Ohio, as required by Chapter 6109 of the Ohio Revised Code, causes many health problems including cancer. From this allegation the Citizens leap to the conclusion that a federal court has jurisdiction to review the evidence concerning the wisdom of the enactment of the fluoridation statute and declare it to be unconstitutional. The Complaining Citizens' fantastic leap, however, overlooks several flaws in their assumptions which, when appreciated, glaringly expose their action to be an invitation for the federal courts to act as a superlegislature, an approach which this Court has consistently rejected since the end of the substantive due process era. See **Ferguson v. Skrupa**, 372 U.S. 726, 729-730 (1963).

As will be established in this brief, the Citizens' arguments overlook the fact that fluoridation has been almost universally recognized as the most effective weapon in the public arsenal against one of the most widespread public health problems, dental caries, i.e., tooth decay. In addition, the Complaining Citizens disregard the fact that numerous authorities dispute the opinion of the individual relied upon by the Citizens, Dr. John Yiamouyiannis, who claims that fluoridation causes cancer and other medical problems. Thus, the Complaining Citizens seek to have a federal court perform the legislative function of balancing the benefits of fluoridation with the risks, if any, and determine that the elected representatives of the people in the Ohio General Assembly have erroneously balanced those risks and benefits. Even this, however, is not the end of the Complaining Citizens' attempt to transform the federal court into a superlegislature.

Nothing in Chapter 6109 of the Ohio Revised Code compels the Complaining Citizens to use public water supply systems if they do not like the type of water being provided by it. In no way is a restriction imposed upon their liberty and freedom to use other sources of water which conform to their notions of good health. But this freedom is not enough for the Complaining Citizens. Instead they seek a decision which by banning the use of fluoridation compels all citizens, including those who are willing to assume the risks, if any, of fluoridation in exchange for its benefits, to conform to the Complaining Citizens' views of good health. In essence, in the action which they filed below the Complaining Citizens seek not to enhance their own freedom to use non-fluoridated water, but rather to restrict the liberty of their fellow citizens to choose in favor of the health benefits of fluoridation.

Within the dynamic reflexibility of the political process those who wished to enjoy the benefits of fluoridation were victorious. The Complaining Citizens' action in the district court is thus nothining more than an attempt to reverse the political process and impose upon all the people of Ohio the Complaining Citizens' views of proper health. If the Complaining Citizens' tactics are upheld, it would create a mechanism by which the most conservative, risk-fearing citizen can slow down the rest of society to his pace of non-advancement. Thus, the crux of the Complaining Citizens claims is minority rule through judicial fiat, rather than majority rule through democratic government.

During the past fifteen (15) years, as the nation has become more environmentally conscientious, there has been an increasing use of the federal courts by segments of society which seek to have their views of environmental health imposed upon the rest of society by judicial order. Such attempts, however, have been repeatedly rejected by the courts. Thus, in **Tanner v. Armco Steel Corp.**, 340 F. Supp. 532 (S.D. Tex. 1972), the court declined to award damages for alleged pulmonary disease which the plaintiff claimed to have been caused by defendant's air pollution in violation of the plaintiff's constitutional right to health. The court explained:

> [F]rom an institutional viewpoint, the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control. Because such problems frequently call for the delicate balancing of competing social interests, as well as the application of specialized expertise, it would appear that their resolution is best consigned initially to the legislative and administrative processes. Furthermore, the inevitable trade-

> off between economic and ecological values presents a subject matter which is inherently political, and which is far too serious to relegate to the *ad hoc* process of "governn nt by lawsuit" in the midst of a statutory vacuum. *Id.* at 536-537.

In **Gasper v. Louisiana Stadium and Exposition District,** 418 F. Supp. 716 (E.D. La. 1976), affirmed, 577 F.2d 897 (C.A. 5, 1978), rehearing denied, 581 F.2d 267, *cert. denied,* 439 U.S. 1073 (1979), the court also rejected a claimed constitutional right to an environment free of unhealthy pollutants. In that case Plaintiffs brought a 42 U.S.C. Section 1983 action alleging that there should be a ban on smoking in the Louisiana Superdome because the smoke was hazardous to the health of non-smokers. Once again the court correctly characterized the suit as an attempt to use the Constitution to foist one group's perception of environmental quality and health upon everyone else. The court declared that:

> [T]he courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments. *** Accordingly, if this Court were to recognize that the Fifth and Fourteenth Amendments provide the judicial means to prohibit smoking, it would create a legal avenue, heretofore unavailable, through which an individual could attempt to regulate the social habits of his neighbor. This Court is not prepared to accept the proposition that life-tenured members of the federal judiciary should engage in such basic adjustments of individual behavior and liberties. 418 F. Supp. at 741.

In a similar manner the court in **Federal Employees for Non-smokers' Rights v. United States**, 466 F. Supp. 181, 185 (D.D.C. 1978), rejected an argument from non-smokers that smoking in public buildings interfered with their constitutional right to a healthy environment. The **Federal Employees** court noted that the theory of a right to a healthful environment was an attempt to use the judiciary to promote one group's view of health over another group's views and concluded:

> [T]he Court firmly believes that such matters are better left to the legislative process, where a proper balancing of interests can be made in a forum where such social decisions can more appropriately be made. *Id.* at 185.

As in **Gasper**, *supra*, and **Federal Employees**, *supra*, the Complaining Citizens in the case at bar are seeking to create a constitutional right to health so that by means of the judicial process they can impose upon society their view that good health is the absence of the potential toxic affects of fluoride rather than the currently prevailing view that the presence of fluoride adds to good health because it reduces dental caries (tooth decay). This political decision should be and has been made in this state by the Ohio General Assembly. Thus, as in **Gasper**, *supra*, and **Federal Employees**, *surpa*, the Complaining Citizens should not be permitted to use the judicial fiction of a right to a health to circumvent the legislative process.

Both of the courts below declined the Complaining Citizens' invitation to act as a superlegislature. The Court of Appeals did not, however, cite any specific decision of this Court, relying instead upon **Federal Employees**, *supra*. As a result, the Complaining Citizens argue that the Sixth Circuit's decision is inconsistent

with certain decisions of this Court. In the next section of this brief, the Respondents will establish that the uniform refusal of all the federal courts, including the Sixth Circuit, to act as a superlegislature and make their own legislative judgments as to how the risks and benefits of living in a complex society should be allocated is entirely consistent with the holdings of this Court.

B. This Court Has Repeatedly Held That The Judiciary May Not Substitute Its Policy Judgment For That Of The Legislature On A Matter Which Is Reasonably Debatable.

1. The Constitution prohibits the federal courts from reevaluating the wisdom of legislation.

In **Ferguson v. Skrupa**, *supra*, this Court declared that:

> Under the system of government created by the Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.
>
> * * * *
>
> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. *Id.* at 729-730.

The judiciary's scope of review is limited to determining whether the legislation is "at least debatable." **United**

States v. Carolene Products, 304 U.S. 144, 154 (1938). As a result, this Court has clearly and unambigiously declared that:

> Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends public welfare. **Day-Brite Lighting v. State of Missouri**, 342 U.S. 421, 423 (1952).

Thus, "States are not required to convince the courts of the correctness of their legislative judgments." **Minnesota v. Clover Leaf Creamery Co.**, 449 U.S. 456, 464 (1981). Indeed, this Court's refusal to review the wisdom of legislation is reflected in a virtually unending litany of cases in addition to those previously cited. See for example, **Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.**, _____U.S._____, 102 S. Ct. 1186, 1196 (1982); **Hodel v. Indiana**, 452 U.S. 314, 333 (1981); **Vance v. Bradley**, 440 U.S. 93, 111-112 (1979); **New Orleans v. Duke**, 427 U.S. 297 (1976); **Berman v. Parker**, 348 U.S. 26 (1954).

Furthermore, this refusal to review the wisdom of legislation is not confined merely to the area of economic regulation but also includes measured designed to protect or enhance public health. **Minnesota v. Clover Leaf Creamery Co.**, *supra;* **Hodel v. Indiana**, *supra;* **Standard Oil Co. v. City of Marysville**, 279 U.S. 582, 584 (1929); **Lambert v. Yellowley**, 272 U.S. 581, 590, 594, 596 (1926); **Cusack v. City of Chicago**, 242 U.S. 526, 531 (1917); **Price v. Illinois**, 238 U.S. 446, 451-452 (1915); **Collins v. State of Texas**, 223 U.S. 288, 298 (1912); **Laurel Hill Cemetery v. City and County of San Francisco**, 216 U.S. 358, 365-366 (1910). **Jacobson v. Massachusetts**, 197 U.S. 11 (1905). Thus, the question to be resolved in

this case is not whether the Ohio General Assembly was right or wrong in determing that the benefits of fluoridation outweigh the risks, if any, but rather whether the General Assembly had a reason for enacting Ohio Revised Code Section 6109.20 which is "at least debatable." In the section of this brief which follows the Respondents will establish that after over thirty (30) years of litigation concerning the benefits and risks of public water supply fluoridation, it was lawful for the Sixth Circuit to take judicial notice of the information which is available indicating that fluoridation provides many public health benefits and little, if any, risk to the public, thereby establishing that the wisdom of Chapter 6109 is clearly "at least debatable."

2. During the thirty (30) years over which the validity of fluoridation laws has been litigated, evidence has been produced, as to which the court may take judicial notice, establishing that the wisdom of public water supply fluoridation is at least debatable.

This Court has repeatedly held that it is proper to take judicial notice of legislative facts which establish that the wisdom of legislation is "at least debatable." **Minnesota v. Clover Leaf Creamery Co.** *supra* at 464; **United States v. Carolene Products Co.**, *supra* at 154. The legality of fluoridation statutes has been repeatedly litigated for over thirty (30) years and therefore the basis for the enactment of fluoridation statues is within the province of judicial notice.

Indeed, the constitutionality of Section 6109.20 of the Ohio Revised Code has, in effect previously been affirmed in **Alkire v. Cashman**, 350 F. Supp. 360

(S.D. Ohio, 1972), *aff'd*, 477 F.2d 598 (C.A.6, 1973) *cert. denied*, 414 U.S. 858 (1973). In **Alkire**, *supra*, the district court, in affirming the constitutionality of Section 6111.13 of the Ohio Revised Code declared, that:

> Courts, both state and federal, have held with virtual unanimty that the fluoridation of public water systems does not violate the due process clause or constitutional rights incorporated by that clause of the Fourteenth Amendment to the United States Constitution. *Id.*, at 362.

Section 6109.20 is virtually identical to Section 6111.13 and is merely a recodification of the former provision resulting from the Ohio General Assembly's decision to create a chapter of the Revised Code dealing with drinking water quality separately from Chapter 6111 which deals with water pollution. As a result the language of former Section 6111.13 was transferred to the new Chapter 6109 as Section 6109.20. Thus the Sixth Circuit's decision in **Alkire**, *supra*, is fully applicable to, and dispositive of, the Complaining Citizens' challege to the State's actions taken pursuant to Section 6109.20 of the Ohio Revised Code. In addition, in **Crawford v. City of Detroit**, 389 F.2d 1001 (C.A.6, 1968), the Sixth Circuit also rejected a claim that fluoridation of a public water supply was unconstitutional.

Furthermore, this Court has repeatedly indicated that the constitutionality of fluoridation of public water supplies is no longer open to controversy. On five separate occasions state supreme courts have upheld the constitutionality of fluoridation and an appeal was then filed in this Court. In every case this Court has dismissed the appeal for want of a substantial federal question. **Minnesota State Board of Health v. City of Brainard**,

241 N.W.2d 624 (1976), *appeal dismissed,* 429 U.S. 803 (1976); **Canton v. Whitman,** 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975), *appeal dismissed,* 425 U.S. 956 (1976); **Chapman v. City of Shreveport,** 225 La. 859, 74 So.2d 142 (1954), *appeal dismissed,* 348 U.S. 892 (1954); **Kraus v. City of Cleveland,** 163 Ohio St. 559, 122 N.E.2d 609 (1955), *appeal dismissed,* 351 U.S. 935 (1956); **Birnel v. Town of Fircrest,** 53 Wash.2d 830, 335 P.2d 819 (1959); *appeal dismissed,* 361 U.S. 10 (1959). In addition, the Court has four times denied certiorari on decisions of state courts upholding the constitutionality of fluoridation. **Paduano v. City of New York,** 45 Misc.2d 718, 257 N.Y.S.2d 531, *affirmed,* 24 App. Div.2d 437, 260 N.Y.S.2d 831 (1965), *affirmed,* 17 N.Y.2d 875, 271 N.Y.S.2d 305, 218 N.E.2d 339 (1966), *cert. denied,* 385 U.S. 1026 (1967); **Schuringa v. City of Chicago,** 30 Ill.2d 504, 198 N.E.2d 326 (1964); *cert. denied,* 379 U.S. 964 (1965); **DeAryan v. Butler,** 119 Cal. App. 2d 674, 260 P.2d 98 (1953), *cert. denied,* 347 U.S. 1012 (1954); **Dowell v. City of Tulsa,** 273 P.2d 859, 43 A.L.R.2d 445 (Okla. 1954); *cert. denied,* 348 U.S. 912 (1955). Furthermore, the constitutionality of fluoridation has been repeatedly upheld in virtually every state of the union. See for example, **Wilson v. City of Council Bluffs,** 253 Iowa 162, 110 N.W.2d 569 (1961); **Readey v. St. Louis County Water Co.,** 352 S.W.2d 622 (1961), *appeal dismissed,* 371 U.S. 8 (1962); **Teeter v. Municipal City of LaPorte,** 236 Ind. 146, 139 N.E.2d 158 (1956); **Baer v. City of Beard,** 206 Or. 221, 292 P.2d 134 (1956); **Froncek v. City of Milwaukee,** 269 Wisc. 276, 69 N.W.2d 242 (1955). In essence, the fluoridation debate has been going on for over thirty (30) years. Constitutional challenges have been rejected by virtually every court in the country. Nine times this Court has had a chance to pass upon the question, but has declined to do so each time. In five of those instances, the Court specifically indicated that the

appeals were dismissed because the fluridation issue does not present a substantial federal question.

As a result of all this litigation, dental caries, or tooth decay, has been recognized in numerous judical decisions as a serious public health problem. See for example, **Minnesota State Board of Health,** *supra,* at 632; **Chapman v. Shreveport,** *supra,* 74 S.2d at 146; **Readey,** *supra,* 352 S.W.2d at 626. Furthermore,

> The relation of dental hygiene to the health of the body generally is now so well recognized as to warrant judicial notice. **Dowell,** *supra,* 43 A.L.R.2d at 451.

Thus the prevention and treatment of dental caries have been widely accepted as a basis for the exercise of a state's police power to protect public health. Furthermore, the effectiveness of fluoride treatment in reducing the incidence of dental caries is "beyond any serious question". **Minnesota State Board of Health,** *supra,* at 629. The reduction is as high as 50-65 percent. **Chapman,** *supra,* 74 S.E.2d at 144; **Readey,** *supra,* at 626. As a result, fluoridation treatment has been endorsed by a plethora of public health organizations.

In many of these previous decisions upholding the constitutionality of fluoridation the courts have expressly acknowledged that there is a conflict of opinion in the scientific community concerning the risks and benefits of fluoridation. **DeAryan,** *supra,* 260 P.2d at 99-100; **Minnesota State Board of Health,** *supra* at 629; **Readey,** *supra,* 352 S.W.2d at 627. Indeed, in **Readey,** *supra,* at 626, the court noted many of the same claims of adverse health effects as are made by the Complaining Citizens in the case at bar. See also **Graybowl v. McNevin,** 439 S.W.2d 323, 330-331 (Kent. 1969); **Attaya v. Town of**

Gonzalez, 192 So.2d 188, 193 (La. App. 1966); **Hall v. Bates**, 247 S.C. 511, 148 S.E.2d 345, 346 (1966); **Schuringa**, *supra*, at 330-331; **DeAryan**, *supra*, 260 P.2d at 100-101. In each case the courts have recognized that despite the alleged adverse health effects the fluoridation program did have a constitutionally permissible basis as a public health measure because of the wide belief in its beneficial effects to control dental caries and therefore the role of judicial review was completed. The wisdom of fluoridation in light of its benefits and risks was left to the legislative and executive branches. This is now a settled issue of law and no longer presents a substantial federal question.

The Sixth Circuit, in its decision below, and based upon this extensive history of anti-fluoridation litigation, stated:

> Appellants seek to present scientific evidence to support their claims that fluoridation creates a serious risk of harm. Scientific evidence, however, also exists which supports the view that fluoridation does not create a serious risk of harm to the public. The fluoridation issue has been presented to the Ohio legislature and Ohio Revised Code Section 6109 et seq. is the result of the exercise of its legislative judgment. We agree with the district court that the resolution of the fluoridation issue must be left to the legislative process.

In effect, the Sixth Circuit recognized that after thirty (30) years of litigation the debatable nature of the fluoridation issue was clear and the scope of its review was therefore satisfied. Then, based upon the repeated

holdings of this Court, it refused to determine whether the Ohio General Assembly's decision was right or wrong, recognizing that such a question was one for legislative, not judicial determination. This approach is clearly correct. In their brief in support of their petition for certiorari, however, the Complaining Citizens severely misconstrue the holding below as being inconsistent with prior decisions of this Court. The Respondents will now address those claims.

3. The Complaining Citizens' Petition For Certiorari Is Based Upon A Serious Mis-Interpretation Of The Opinion Below And Prior Decisions Of This Court.

The Petitioners Complaining Citizens make two arguments to this Court: (1) the Sixth Circuit's decision below that their claims involved a non-justiciable political controversy is contrary to this Court's decision in **Jacobson v. Massachusetts,** *supra;* and (2) the court of appeals refused to accept the allegations of their complaints as true in violation of this Court's holding in **Jenkins v. McKeithen,** 395 U.S. 411, 421-422 (1969). The fallacy of each argument will now be explored.

The error in the Complaining Citizens' attempt to compare the Sixth Circuit's holding of non-justiciability in the case at bar with this Court's treatment of the dispute in **Jacobson,** *supra,* as a justiciable controversy lies in the Citizens' failure to appreciate the limited scope of review in the cases. **Jacobson** involved an appeal from a conviction for refusal to be vaccinated as required by a Massachusetts statute. The appellant challenged the statutory requirement for the vaccination. He proferred that his refusal to be vaccinated was justified because there was scientific evidence which indicated that the vaccination could be harmful to his health. The Court rejected this argument and declared:

> The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good. It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease, and to render it less dangerous to those who contact it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. . . .The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. *Id.* at 34-35 (Emphasis supplied).

The Court thus rejected the notion that the judiciary, rather than the state legislature, could determine the policy question as to whether the benefits of vaccination programs outweigh the risks. Indeed, this Court limited its scope of review to determining whether there was a debatable basis for the vaccination program, and after using judicial notice to establish that there was such a basis, rejected the appellant's argument. *Id.* at 30-31. The Sixth Circuit followed the same approach in the case at bar. It treated the case as justiciable for the

limited purpose of determining that since there is evidence on both sides of the fluoriuation question, there is at least debatable grounds to support the Ohio General Assembly's legislative judgment. As to the Complaining Citizens' invitation to resolve the conflict and conclude that the Ohio General Assembly's policy judgment was erroneous, however, the Sixth Circuit properly treated that question as a non-justiciable matter. This is entirely consistent with the Court's repeated holding that:

> [L]itigants may not procure invalidation of legislation merely by tendering evidence in court that the legislature was mistaken. **Minnesota v. Clover Leaf Creamery Co.**, *supra* at 464.

In essence, the decision below correctly treated the question of the wisdom of the fluoridation statute as a non-justiciable matter.

The Complaining Citizens' second argument, that the lower Courts failed to accept the truth of the allegations in their complaints as required by **Jenkins v. McKeithen**, *supra*, similarly misinterpretes the lower courts' holdings. Both lower courts recognized simply that it was not within the judicial function to determine whether their claims of injury were true, but rather the court was limited solely to determining that the basis for Revised Code Section 6109.20 was "at least debatable". Once the debatable nature of the proposition was established, the courts' limited role was completed. Therefore the courts properly concluded it was not their funciton to determine whether the Citizens' claims of injury are or are not true.

CONCLUSION

The claims of the Petitioner Citizens involve an attempt to impose upon others their theories of good health by means of judicial fiat. The crux of their case is that they wish for the judiciary to resolve the policy judgment involving the benefits and risks of fluoridation and determine that the Ohio General Assembly was wrong in adopting Section 6109.20 of the Revised Code. As the numerous decisions of this Court have held, it is not the function of the judiciary to evaluate the wisdom of legislation. The courts determine merely if there are debatable grounds for the statute. In this case the district court properly determined that there no longer remains a substantial constitutional question concerning the debatable nature of fluoridation statutes. The court of appeals correctly concluded that an attempt to litigate the wisdom of the legislation beyond its debatable nature involves a non-justiciable matter which must be addressed in the political arena of the legislative branch of government. As this Court held in **Vance v. Bradley**, *supra*, at 97:

> [J]udicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Therefore, the Complaining Citizens' petition for certiorari should be denied.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

EDWARD D. HAYMAN
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

CERTIFICATE OF SERVICE

I hereby certify that three copies of Brief in Opposition to Petition for Writ of Certiorari have been forwarded to each of the following; Larry L. Inscroe, Inscore, Rinehardt and Whitney, 3 North Main Street, Mansfield, Ohio 44902, Counsel for Petitioners and to James DeWeese, Inscore, Rinehardt and Whitney, 3 North Main Street, Mansfield, Ohio 44902, Counsel for Petitioners, via the U.S. Mail, this 6th day of October, 1982.

E. DENNIS MUCHNICKI
Assistant Attorney General